Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 85-531

In the Supreme Court of the United States

OCTOBER TERM, 1985

THE CITY OF LOS ANGELES, etc., et al.,

Petitioners,

v.

RONALD HELLER,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED*

1. May a plaintiff in an action under 42 U.S.C. 1983, in which claims were made against both an individual police officer defendant and against a municipal entity and its supervisorial personnel under Monell v. New York City Department of Social Services, 436 U.S. 800 (1978), in which a bifurcated trial was ordered so that plaintiff's claims against the police officer defendant were tried first and then plaintiff's claims against the other defendants were to have been tried, and in which plaintiff

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* This Court has eschewed the practice by counsel of phrasing questions presented in a misleading manner, and hence respondent's counsel has rephrased the questions presented by petitioners. Katz v. United States, 389 U.S. 347, 351-52, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) ("[In instances in which t]he petitioner has phrased ... questions [in a misleading manner w]e decline to adopt th[e] formulation of issues .... Because of the misleading way the issues have been formulated, the parties have attached great significance to [matters which are not dispositive of the petition for certiorari].")

did not prevail in the first phase of the trial, then proceed to trial of his claims that the defendant police officer's alleged wrongful conduct represented implementation of an articulated governmental policy, if the jury in the first trial heard, as part of the case on excessive force against the police officer defendant, that the policy of the police department, under whose provisions the officer testified he acted, was unconstitutional on its face because it constituted a policy of use of excessive force?

2. Does the Supreme Court of the United States sit as a court of errors to correct perceived, but nonexistent, errors in a notice of appeal in a matter in which a notice of appeal clearly and unambiguously set forth the matter from which appeal was taken?

PARTIES BELOW

Respondent disagrees with that part of petitioners' statement of the parties below which states that "Tom Bradley and Daryl Gates were defendants in the trial court who were dismissed on motion for summary judgment ...." Petition at iii. Bradley and Gates were not dismissed on motion for summary judgment. As the trial court's docket sheet indicates, on September 21, 1981, "Act DISMISSED as to ... Gates, Bradley ...." Docket Sheet, page 11, entry No. 143, attached hereto as Appendix 1.

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

INTRODUCTION

Respondent, Ronald Heller, an early 1960's All-American running back at USC, in June 1980 was on a visit from his home in Ketchum (Sun Valley) Idaho, to his parents in Los Angeles, California. Out in a car with two friends in the Venice area of Los Angeles, Heller was stopped by defendant Los Angeles police officer Craig Bushey. After field sobriety tests were administered, Bushey grabbed Heller in a carotid chokehold and threw Heller through a plate glass window into the store-converted-to-living-quarters of Latvian artist Valdemars Darznieks, who was awakened from a deep sleep with Heller and Bushey on top of him on his bed. This action followed. RT of trial October 19, 1982 to October 25, 1982; CR-1.

This action presents an unfortunate example of what happens in instances in which (1) the trial judge is sloppy, (2) a newly-sworn-in federal judge with no federal court

experience either in practice or on the bench decides to try an action two days after being sworn in, and (3) appellate counsel was not trial counsel, and does not have first-hand knowledge of what actually transpired pretrial and at trial, and is confronted and confounded by an almost unintelligible record which is the product of factors (1) and (2), immediately above.

None of the assumptions or arguments of petitioners is accurate and there is no legitimate reason for this Court to waste its time in an attempt to tidy up the unkempt house which lies in the wake of the trial in this action. The petition for certiorari therefore should be denied.

REASONS FOR NOT GRANTING CERTIORARI

1. THE COURT OF APPEALS DID NOT DECIDE A FEDERAL ISSUE IN A MANNER IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. The decision below is not based on the premise that the jury did not follow its instructions.

Petitioners' contention that the decision below is based on the conclusion that the jury failed to follow its instructions is speculation not supported in the record, and therefore petitioners' contention that other circuits have decided that it is presumed that juries do follow instructions and hence the Ninth Circuit's decision in this case is in conflict with the law in other circuits is without merit.

Contrary to petitioners' interpretation of the jury instructions, it is clear that those instructions asked the jury to resolve every

issue presented to it only as to the defendant officer whose case the jury was hearing. No instruction asked the jury to decide a larger issue: Were plaintiff's rights violated? The instructions are clear, and the jury's finding, when taken in conjunction with the instructions, is equally clear: the jury found the defendant officer did not violate respondent's federal rights.

The court below did not improperly assume or assume at all, that the jury decided the case against the officer based on issues not before the jury. That the issue of qualified immunity, cf. Harlow v. Fitzgerald, 457 U.S. 800 (1982), was not presented to the jury in a jury instruction in no wise operates to support petitioner's unfounded contention that the jury did not consider the evidence presented that the officer (1) employed physical force pursuant to then-current police department escalating force policy, and (2) that that policy was

unconstitutional because it enshrined into policy permissible excessive force. The jury did not, as petitioners contend, decide the case on issues of law not presented to it: rather, the jury presumably based its decision on the evidence before it, and part of that evidence is the evidence set forth at (1) and (2), immediately above.

The court below did not, as petitioners argue, "impliedly" decide an important question of federal law with respect to whether or not it should be assumed that juries follow their instructions. Based on this fanciful theory of "implied" and imagined decision-making, petitioners then argue that it is important for this Court to grant certiorari to insure that federal courts in Section 1983 actions henceforth will not be stymied by not being able to bifurcate trials of Section 1983 actions. There is no support in the facts or procedural history of this case to warrant petitioners'

urging that this Court grant certiorari on this ground.

The problem petitioners believe was "impliedly" created easily could be cured by use of a special verdict form in a bifurcated Section 1983 action, and the intervention of this Court is not warranted to achieve that result for those parties in Section 1983 actions who perceive a problem as do petitioners.

B. The court's decision does not suggest that Monell-type actions may be maintained on a respondeat superior basis.

The only "basis" for petitioners' contention that the court's decision "suggests" that Monell-type Section 1983 actions may be based on a theory of respondeat superior is petitioners' suggestion.

The jury properly could have, and presumptively did, decide that the defendant officer acted within police department policy. There was no evidence that he did not act within policy; indeed, the officer and his sergeant testified the officer acted within policy, and plaintiff argued this to the jury. Thus, the jury could have, within both the parameters of its instructions and the evidence presented to it, decided that the officer did not violate respondent's federal rights because the officer was acting within police department policy--a successful Nuremburg defense (although it was illegal, contrary to popular belief, for the nazis to engage in the very conduct for which they claimed what came to be know as the Nurembrug defense). That is, although there was no formal jury instruction on qualified immunity, there was a submission of that concept to the jury.

APPENDIX 1

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PLAINTIFFS

RONALD HELLER

DEFENDANTS

CRAIG BUSHEY, CALVIN BRASHER, DARYL GATES, JAMES FISK, SAMUEL WILLIAMS, MARIANA PFAELZER, STEPHEN REINHARDT, SALVATORE MONTENEGRO, RIVA TOOLEY, STE[illegible] YSLAS, TOM BRADLEY, and THE [illegible]ELES,

CAUSE Cmplt for Damages

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UNITED STATES DISTRICT COURT DOCKET

DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 80-2643
RONALD HELLER	CRAIG BUSHEY ET AL.	PAGE 10 OF ___ PAGES

DATE	NR.	PROCEEDINGS
9-22-81	mm	141. Fld respondent's oppo to motn for ord re Robert Johnson
9-23-81	mm	142. Fld ORD (TJH) deft Calvin Brasher's motn for S/J GRANTED; Deft Craig Bushey's motn for S/J GRANTED w/respect to: claims in cnts 1,3,4,5,7,8,& 9 of 1st A/C & claims in cnts 2,6 that arise under 42USC1985(3) & 1986. Deft Craig Bushey's motn for S/J is DENIED with respect to: claims in cnts 2 & 6 that arise under 42 USC 1983 & Claims in cnt 22. Deft Craig Bushey's motn for S/J is DENIED w/o prejd with respect to the State law tort claims in cnts 10, 11, 12, 13, 14, 15 & 18. This Crt retains pendent jurisd over those claims. Deft's Daryl Gates, James Fisk, Samuel Williams, Mariana Pfaelzer, Stephen Reinhardt, Salvatore Montenegro, Riva Tooley, Stephen Yslas, Tom Bradley & City of LA's motn for S/J is DENIED w/o prejd. This action is set for PTC 10-26-81 at 10 a.m.
*9-21-81	mm	143. MIN ORD: HRG re pltf's motn to hold Gate, Bradley, Williams & Fisk in crim contempt etc. DENIED. Defts' motn for S/J & to stay taking of depos contd to 10-5-81. Act DISMISSED as to Pfaelzer, Rhinehardt, Gates, Bradley, Williams & Fisk. Police Comm. to be substituted in as deft in place of individual comms.
9-30-81	mm	144. Fld deft's notc of taking depo of Ronald Heller on 10-7-81.
10-2-81	mm	145. Fld pltf's decl of Leo Salazar in connection w/attempts to duck servc of process by Police Chief Daryl Gates, City Atty Ira Reiner & Mayor Tom Bradley.
10-2-81	mm	146. Fld pltf's suppl memo of P&A in support of pltf's motn to compel prod of doc from defts.
10-7-81	mm	LODGED: Pltf's proposed Ord re contempt. NOT USED LODGED: Pltf's proposed ord re dism of specified defts. NOT USED LODGED: Pltf's proposed ord re compel prod of materials. NOT USED
10-6-81	mm	147. Fld deft City of LA's ORD(TJH) for S/J contd to 10-5-81 a.m.; defts Bradley, Gates, Pfaelzer, Reinhardt, Williams, Montenegro, Tooley, Yslas & Fisk's motn for S/J is GRANTED.
10-6-81		148. Fld ORD (TJH) Pltf's motn to adjudge defts Bradley, Williams, Fisk Gates & their attys Murdock & Reiner in contempt is DENIED.
10-15-81	mm	LODGED: deft's proposed ord to compel prod of docs. NOT USED.
*10-5-81	mm	149. MIN ORD: HRG: motns re contempt DENIED; motn for S/J to be renotc for fur discov; City to turn over all records re Hller, etc. for period of 6-79 thru 6-81 by 10-19-81.
10-21-81	mm	150. Fld pltf's memo of conts of fact & law. 151. Fld pltf's witn list. 152. Fld pltf's joint exh list.
*10-16-81	mm	153. Fld ORD (TJH) re production of specified docs listed herein.
10-19-81	mm	154. MIN ORD: HRG re pltf's motn to hold Robert Johnson in contempt & for sanct. No appr by pltf; cnsl states that pltf's cnsl informed him he was withdrawing motn; crt declines withdrawal of motn & DENIES motn.

DC 111A REV 10/75

By analogy: if a police department had a K-9 corps and a policy that officers in the K-9 corps were to travel abroad with a dog in each K-9 unit with a window of the unit to be opened at all times, and a dog, pursuant to policy, but mistakenly (if dogs can make mistakes) rushed to the aid of a K-9 officer who, to the dog, appeared to need, but in fact, did not need assistance, and in that act mauled a civilian: could the officer be held liable for a use of excessive force under Section 1983?; if the officer were held not to liable, could the policymaker and the governmental entity be held liable on a Monell theory? The answer to the second part of this question clearly is "yes." This result has been reached consistently and uniformly by all circuit courts who have ruled on the issue.

In Garcia v. Salt Lake County, 768 F.2d 303, 310 (10th Cir. 1985), the most recent decision on this issue, the court held:

> Salt Lake County should be held liable for actions which are taken by its employees which are taken pursuant to a policy, custom or practice of Salt Lake County.
>
> Monell does not require that a jury find an individual defendant liable before it can find a local governmental body liable.

Cf. Grandstaff v. City of Borger, Texas, 767 F.2d 161 (5th Cir. 1985). The ruling of the court below in this case is entirely consistent with the principles enunciated by this Court in Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), and in harmony with all other circuits in this country who have ruled on this issue. (Interestingly, courts who bifurcate Section 1983 claims against police officers from 1983 claims against governmental entities and their supervisorial employees, routinely have held that in

instances in which 1983 plaintiffs prevail against the officers, they may not proceed on their Monell claims on the premise that such plaintiffs have already recovered from the officers all damages they legally may recover. See Sanchez v. City of Riverside, California, 596 F. Supp. 1983 [C.D. Cal. 1984]. This scenario, if taken in conjunction with the premise urged by petitioners--that a 1983 plaintiff who loses against the police officer may not then proceed to trial against government on the Monell claim--would operate to permit any federal judge to foreclose any Monell claim simply by an order of bifurcation. It does not seem that this result was intended by Monell which clearly stands for the proposition that claims brought pursuant to that case be legally possible to bring and try.)

The decision of the court below does not enlarge Monell, does not provide for Section 1983 liability against state governmental

entities based on respondeat superior, and simply furthers the principles enunciated by this Court in Monell.

Petitioners' contentions that "There is simply no way an arrestee could be subjected to excessive force and not suffer a deprivation of his constitutional right to due process[,]" Brief at 35, and "[liability may be imposed on a governmental entity] where a jury has conclusively found no injury[,]" id. at 36, are true but misleading. Here, the jury found that the respondent was not deprived of his rights by the officer. There is no finding, express or implied, in the verdict that respondent's rights were not violated: the only finding made by the jury, indeed the only finding which could have been made by the jury, is that this officer did not violate respondent's rights. Similarly, the jury did not find that there was no injury. That is all it found. Petitioners' speculation about what the court

of appeals decision "impliedly" means or "appears to permit," id. at 37, is at odds with petitioners' argument that courts of appeals must interpret jury verdicts in a rational manner.

2. THE DECISION IS NOT IN CONFLICT WITH DECISIONS BY OTHER CIRCUITS.

The fatal defect of petitioners' argument that the decision below is at odds with decisions by other circuits is that there is no factual predicate in the record for this contention. Simply put, the respondent's notice of appeal specifically set forth the appeal was taken from the September 21, 1981 dismissal of the claims against Bradley and Gates. CR-143. Therefore, the court below did not decide an issue on appeal which was not set forth in the notice of appeal. There is no factual predicate in the record for petitioners' contention, and there is no variance in the law among the circuits, on this issue, in this case.

Contrary to petitioners' ill-advised assertion that the court below is "hypocritical," Brief at 45, petitioners counsel is less than diligent for not reading and understanding the record and presenting it properly to this Court.

3. THE COURT BELOW DID NOT DECIDE AN IMPORTANT QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

A. This case does not present an extremely important question of federal law whose impact on the court system will cause the system to submerge.

As argued above, the court below simply implemented the Monell decision of this Court. By invocation of the much-used shibboleth that letting the decision of the court below stand will operate to sink the federal court system by enormous expenditures of time and resources,

petitioners shout fire in a crowded theater and hope to stampede this Court to grant the petition for certiorari. On this point, this Court should take notice of Milan Kudera's adage that "man's struggle against power is the struggle of memory against forgetting," "The Book of Laughter and Forgetting," and recall the occasions on which other counsel attempted to convince this Court from an argument to consequences that the Court should grant relief requested. As with petitioners' other arguments, this argument also is without a factual predicate.

First, although it may be an issue of first impression in this court whether Section 1983 actions may be bifurcated between claims against police officers and Monell claims, such an issue is a straw man. Surely, this Court does not sit to advise federal trial courts how they should handle their calendars or how they best can govern the order of presentation of

proof under Federal Rules of Evidence (West 1985) Rule 611. Of course, trial courts can bifurcate Section 1983 actions as was done in this case. And, since petitioner did not object to the bifurcation (respondent did), petitioner cannot now complain of the bifurcation order. Petitioner has not preserved this issue for appellate review.

Second, contrary to petitioners' unsupported assertion that Monell claims "involve lengthy, resource-consuming problems of proof to support the allegation that the municipality had a policy, custom or usage which caused the injury[,]'" Brief at 47-48, proof of policy claims takes less than an hour, as the record demonstrates in this case. RT-October 19, 1982, Professor Fyfe's testimony. Petitioners' unsupported speculation that respondent "was apparently prepared to introduce considerable evidence [on policy,]" id. at 48, is sheer speculation unsupported by the record and

belied by what actually transpired. Petitioners' statement that they are "aware of many similar trials which have taken weeks or months to complete because of the voluminous nature of such evidence[,]" id. at 49, is an improper argument on this petition. Which trials are referred to? In which court did they take place? Were counsel on both sides competent?

Invocation of the catch-phrase "it will submerge the federal courts," is unfounded, hysterical, and unwarranted.

There is no implication that bifurcation cannot be had if the decision of the court below stands. What petitioners want is to cut off all potential Monell claims by reasoning analogous to the second part of this Court's plurality decision in Parratt v. Taylor, 451 U.S. 527 (1981), to the effect that existence of a state tort remedy would operate to bar maintenance of a Section 1983 claim in federal

court. What they attempt to argue is that Monell claims should be permitted to be effectively foreclosed from litigation: in instances in which plaintiffs prevail on the underlying claim against an officer, plaintiffs could not proceed against the government, Sanchez, supra; and in instances in which plaintiffs did not prevail against the officer, then plaintiffs, by petitioners' argument, could not proceed against the government. Petitioners' reasoning would render this Court's holding in Monell an empty jar: governmental entities would be "persons" under Section 1983, but "persons" upon whom a federal judge could confer a de facto procedural immunity simply by bifurcating a trial.

In instances in which governments have policies and their officers act pursuant to those policies, governments properly may be held accountable for the actions of their officers which violate citizens' constitutional

rights notwithstanding that the officers may not have been held liable for those wrongful acts. Monell and Garcia, supra. This is all the court below held, and its holding does no injustice to any holding by this Court, nor does it create the vehicle by which all those who litigate Section 1983 actions with Monell components risk drowning and suffocation by the trial of Monell claims. Petitioners' argument to the contrary is hysterical and without merit.

4. CONCLUSION.

If this Court determines that it has the judicial resources to grant certiorari, it should do so, and thereby insure that the decision of the court below is understood and uniformly applied throughout the federal system.

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